FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 304.

DANIEL P. BOONE, *Petitioner*,

v.

MARTHA LOUISE BOONE, as Trustee for Martha Penelope Boone, a Minor,

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 204.

DANIEL F. BOONE, *Petitioner*,

v.

MARTHA LIGHTNER BOONE, as Trustee for Martha Penelope Boone, a Minor.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Respondent brought this action in the United States District Court for the District of Columbia upon a money judgment obtained against petitioner in North Carolina (R. 4, 6-17), which judgment had been affirmed by the Supreme Court of that State (*Lightner* v. *Boone*, 222 N. C. 205, 22 S. E. (2) 426), and affirmed on certiorari by this Court *Boone* v. *Lightner*, 319 U. S. 561, 87 L. ed. 1587). In his answer, petitioner undertook to attack the judgment in the North Carolina suit on the grounds, among others, that (1) petitioner was in the Army at the time of that suit and was,

therefore, protected by the Soldiers and Sailors Civil Relief Act of 1940; (2) that the complaint in the suit named him only as Trustee; (3) that the judgment in North Carolina was obtained by fraud and was, therefore, not entitled to full faith and credit (R. 19-30). Pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, respondent moved for judgment on the pleadings (R. 31). This motion was granted, the trial court finding that ability of the defendant to conduct his defense was not materially affected by his military service (R. 32). Judgment in favor of the respondent was accordingly entered (R. 32, 33). This judgment was affirmed by the United States Court of Appeals for the District of Columbia (R. 37).

ARGUMENT.

I.

North Carolina Judgment Entitled to Full Faith and Credit.

Under Point 1 of his brief, petitioner contends that in the North Carolina complaint there was no prayer for judgment against him in his individual capacity. Hence, he asserts personal judgment, even though for the amount of his default, was void. This argument is not sustained by the authorities.

It is well settled that a suit in equity for an accounting brings the entire administration of the trustee under review, and contemplates that a judgment or decree for the balance found, whichever way, will be entered.

> *Ferguson* v. *Bateman*, 1 App. D. C. 279, 287
> *McManus* v. *Sawyer*, 231 Fed. 231, 238
> *Whittemore* v. *Patten, et al*, 84 Fed. 51

Equally well settled is the proposition that in equity, under the prayer for general relief, the court will adapt and shape its decree in accordance with the true equity of the cause. On the evidence before it, the North Carolina Court found that Boone was accountable for $19,677.99 (R. 10);

that he had turned over to the Court's Clerk securities valued at $8,187.43 (R. 11). For the difference, namely, $11,490.56, the Court concluded Boone was still accountable, and accordingly awarded judgment against him individually (R. 13). This was plainly contemplated by the complaint, and in strict conformity to the established practice in equity.

Walden v. *Bodley*, 14 Pet. 156, 10 L. ed. 398, 402
Tayloe v. *Merchants Fire Ins. Co.*, 9 How. 390; 13 L. ed. 187, 193
Jones v. *Van Doren*, 130 U. S. 684, 32 L. ed. 1077
Merillat v. *Hensey*, 34 App. D. C. 398, 407
Hammett v. *Minar*, 60 App. D. C. 286, 53 F. (2) 144
1 Bogert on Trusts and Trustees, Sec. 862
2 Scott on Trusts, Sec. 199.1

II.

Soldiers and Sailors Civil Relief Act.

Petitioner contends that the judgment of the District Court was premature because entered prior to the expiration of ninety days after the termination of his military service. Respondent insists that irrespective of whether petitioner has a right to petition the North Carolina Court to vacate its decree, that decree can not be collaterally assailed. Indeed, even the pendency of such a petition would not constitute a valid defense to this action.

Indemnity Insurance Co. of North America v. *Smoot*, 80 U. S. App. D. C. 287, 152 F. (2) 667

Moreover, we deny that any right to file such a petition is available. The Soldiers and Sailors Civil Relief Act of 1940 (50 U. S. C. A. Sec. 520) applies only to proceedings in which "there shall be a default of any appearance by the defendant".

In re Cool's Estate, 19 N. J. Misc. 236, 18 A. (2) 714.
Reynolds v. *Reynolds*, 21 Cal (2) 580, 134 P. (2) 251

Petitioner was personally served with process (R. 6), filed an answer (R. 7), had his day in court and was not prejudiced in the conduct of his defense by his military service connection. This Court has already determined that "the absence of himself and of all his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy". (*Boone* v. *Lightner,* 319 U. S. 561, 87 L. ed. 1587, 1596.)

II.

Alleged Fraud in Procurement of Judgment.

Petitioner claims, under Points 3 and 4, that the fifth and sixth defenses in his answer (R. 22-48) alleged extrinsic fraud which renders the North Carolina judgment subject to collateral attack. Assuming, for the purpose of argument, that fraud is alleged, the actions complained of did not result in injury to the petitioner.

In substance, the fraud alleged consists in the assertion that "in the North Carolina proceeding, a witness testified that in her opinion the settlor of the trust did not have sufficient mental capacity to know the contents of a certain paper writing signed by him and witnessed by one W. D. Parris; that said Parris was present when the paper was signed and that the existence and availability of said Parris as a witness was withheld from the court." The paper writing pertains solely to the terms of the trust. It did not relate to the handling and mismanagement of the trust funds for which an accounting was sought. Petitioner did not allege any fraud whatsoever as regards the evidence upon which the Court's findings of dereliction, malfeasance and losses were based (R. 12).

In no aspect were the facts alleged sufficient as a basis for collateral attack upon the North Carolina judgment, or an injunction to restrain its enforcement.

Marine Ins. Co. v. *Hodgson,* 7 Cranch, 332-336, 3 L. ed. 362, 363

Hendrickson v. *Hinckley*, 17 How. 443, 445, 15 L. ed. 123, 124
Crim v. *Handley*, 94 U. S. 652, 659 24 L. ed. 216, 219
United States v. *Throckmorton*, 98 U. S. 61, 65, 25 L. ed. 93, 95
Talbott v. *Pickford*, 36 App. D. C. 289, 297
Fidelity Storage Co. v. *Urice*, 56 App. D. C. 202, 203

In other words, the answer plainly showed no real defense. On the contrary, it demonstrated that the only obstacle to the full presentation of his case was peitioner's own "litigious strategy". (*Boone* v. *Lightner, supra*)

The fact that petitioner remained away from North Carolina, after having answered and taken depositions, relying upon delaying tactics, does not affect the finality of the North Carolina judgment.

Last Chance Mining Co. v. *Tyler Mining Co.*, 157 U. S. 683, 39 L. ed. 859, 863
Miller Rubber Co. of N. Y. v. *Massey*, 36 F. (2) 466, 467

It is also perfectly clear that the evidence to which petitioner referred in his answer was available in 1942, at the time of the trial in North Carolina and might have been offered therein. The tender of such evidence more than three years after entry of the North Carolina judgment came too late. (*Indemnity Ins. Co. of N. A.* v. *Smoot, supra.*)

In the North Carolina proceeding, the Court said:

> "The record shows that the defendant (*petitioner herein*) deposited said trust funds in the Wachovia Bank & Trust Company, and subsequently withdrew practically the entire amount and used the same in marginal stock speculation on the New York Stock Exchange. In dealing in this manner, he received many checks from the stock brokers handling his accounts, redepositing some of them in the bank and then making withdrawals or using the checks for his personal purposes. Such speculation on the part of the trustee is wrong. Under the laws of North Carolina, the trustee

> could not purchase said stocks with his trust funds. The bulk of the loss, however, is due to his wrongful withdrawal of the funds for his personal purposes. When called to book by the institution of this action, the trustee attempted technical and evasive tactics. In his answer, which was duly sworn to, he stated that he had not withdrawn any of the trust funds. The evidence proves the falsity of this." (R. 12. Italics supplied)

In the very lengthy answer interposed by petitioner in the pending action, he does not deny either marginal speculation or use of the trust funds for his personal purposes. His answer tendered no issue upon which he was entitled to a trial. Accordingly, respondent was entitled to judgment on the pleadings.

CONCLUSION.

A careful examination of the answer filed by the petitioner in the trial court shows that it is an ingenious and ingenuous attempt to retry issues already determined adversely to him. This was the view of the trial court. It was the conclusion of the Court of Appeals. The judgment of affirmance was clearly right and certiorari should be denied.

Respectfully submitted,

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